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No. 15-9260

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2015 TERM

RECORD
AND
BRIEFS

LEVON DEAN, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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I. 18 U.S.C. § 924(c) does not forbid a district court from varying downward to reach an appropriate aggregate sentence in a specific case after consideration of all the relevant sentencing factors under 18 U.S.C. 3553(a).

The Government contends that 18 U.S.C. § 924(c) precludes a sentencing court from determining an aggregate sentence on all counts of conviction which is "sufficient, but not greater than necessary", as directed by 18 U.S.C. § 3553(a), to advance the purposes of sentencing. (Brief in Opposition pp. 16- 23) It is Petitioner's position that this conclusion is not supported by any statutory language cited by the Government. Clearly, the requirement is for the district court to determine a sentence for the underlying substantive offense and the mandatory 924(c) sentence is to be imposed "in addition to the punishment provided for such crime..." and is to be served consecutive to that sentence. 18 U.S.C. § 924(c)(1) and (c)(1)(D)(ii) Nothing in Section 924(c) nor Section 3584 prohibits the sentencing court from exercising sentencing discretion in determining the aggregate sentence after following the directives of § 924(c).

The Tenth Circuit Court of Appeals reached that conclusion in *United States v. Smith*, 756 F.3d 1179 (2014) by comparing the language in 18 U.S.C. § 1028A(a) with the language in § 924(c). The *Smith* court concluded that such comparison shows that Congress, "...knows exactly how to alter traditional sentencing practices when it wishes, that when it does so it does so in ways and places clear enough for all to see—and that it has done nothing of the kind in § 924(c)." In § 1028A Congress included the following language: "In determining any term of imprisonment to be imposed for the felony during which the [identity theft occurred], a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section[.]" Thus this language is, "Proof that Congress knows

exactly how to strip district courts of their traditional sentencing discretion when it wishes to do so. Further proof too that § 924(c) lacks any such command." *Smith*, 756 F.3d at 1185-1186 (10th Cir. 2014)

The district court in this case followed the required sentencing procedures. The court first determined the advisory sentencing range under the United States Sentencing Guidelines for the underlying offenses and both Section 924(c) counts. (Sent Tr. 2) The court then considered Dean's objections to the Presentence Investigation Report. (Sent Tr. 3-4) The court then considered Dean's request to vary downward. The district court believed that legal precedent kept him from reducing the total sentence for the underlying offense to one day. The district court stated, "If I could look at a combined package, I totally agree with you, Mr. Stoler, that 360 months plus 1 day on Counts 1 through 3 is more than suff – not just sufficient and not greater than necessary. In my view it's more than sufficient for a sentence in this case." (Sent. Tr. 13)

Finally, merely because the Government failed to present its current argument in *United States v. Smith*, *supra*., and believes that once presented to the Tenth Circuit that court "may adopt them", does not mean this Court should not resolve the issue. (Brief in Opposition p. 24) As the Government admitted, the only other courts of appeal to have addressed the issue since *Smith* was decided have prior binding precedent on the issue. (Brief in Opposition p. 24) In *United States v. Ikegwuonu*, 826 F.3d 408 (7th Cir. 2016)(rehearing and rehearing *en banc* denied July 20, 2016) a three-judge panel refused to over turn circuit precedent as the question was not properly before them on appeal. Petitioner is unable to find any other courts of appeal who have addressed this issue after *Pepper v. United States*, 562 U.S. 476 (2011) and after *United States v. Smith*, *supra*. The remaining courts of appeal continue to operate under binding precedent on this matter and are unlikely to rule contrary to that

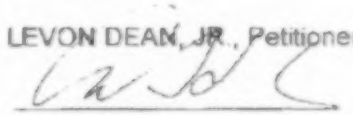
precedent absent intervention by this Court.

Petitioner submits this court should grant the Writ of Certiorari in this case to determine whether, "[T]he length of a § 924(c) sentence can at least sometimes bear legitimate relevance to the sentencing considerations (like the time needed to ensure the protection of the public) that Congress has statutorily directed courts to consider when sentencing for the underlying crime." *United States v. Smith*, 756 F.3d 1179, 1192 (10th Cir. 2014)

CONCLUSION

For the foregoing reasons, and the reasons previously submitted in the Petition for Writ of Certiorari, the Petition should be granted.

LEVON DEAN, JR., Petitioner

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CERTIFICATE OF SERVICE

I hereby certify the Reply Brief filed on behalf of Levon Dean, Jr. was delivered to the Clerk's Office of the United States Supreme Court, 1 First Street, N. E., Washington, DC 20543, postage and fees paid *via* third-party commercial carrier FedEx. I hereby certify that a true and correct paper copy of the foregoing Reply Brief was delivered postage and fees paid via third-party carrier Fedex to:

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